SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 147

GEORGIA, PETITIONER,

vs.

THOMAS RACHEL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE STATE OF GEORGIA,

versus No. 23869

THOMAS RACHEL, JERRY WALKER, LARRY CRAWFORD FOX, DEBBIE AMIS, WILLIE PAUL BERRIEN JR., LYNN PFUHL, MICHAEL SAYER, JULIAN M. SAMSTEIN, RALPH M. MOORE, RONALD FRANKLIN TURNER, CARL C. ARNOLD, JAMES F. THOMPSON, ARCHER COLUMBUS BLACK, CARL VINCENT HILL, JEANETTE STOCKTON HUME, JAMES ARTHUR CHERRY, RUSSELL C. CAMPBELL, ALLEN R. ELLIOTT, ANNA JO WEAVER, and CHARLES EDWARD WELLS.

PETITION FOR REMOVAL—Filed: February 17, 1964

To the Judges of the United States District Court for the Northern District of Georgia, Atlanta Division:

1. The above-named petitioners are presently at liberty on bail and are charged with violating Title 26, Georgia Code Annotated, Section 3005. Petitioners were arrested by members of the Police Department of the City of Atlanta, and their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with re-
[fol. 3] spect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white

or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race.

The petitioners, Thomas Rachel, Jerry Walker, Larry Crawford Fox, Debbie Amis, Willie Paul Berrien, Jr., Lynn Pfuhl, Michael Sayer, and Julius M. Samstein, were arrested on June 17, 1963 when they sought to obtain service, food, entertainment, and comfort at Lebco, Inc., d/b/a Leb's, a privately owned restaurant opened to the general public, 66 Luckie Street, Atlanta, Fulton County, Georgia.

The following-named petitioners were arrested at Lebco, Inc., d/b/a Leb's, a restaurant owned and operated, as aforesaid, and charged by special presentment of the July-August, 1963 Term Grand Jury of Fulton County, Georgia, with violating the above-mentioned statute:

(a) Ralph M. Moore, May 18, 1963
(b) Ronald Franklin Turner, May 18, 1963;
(c) Carl C. Arnold, June 8, 1963;
(d) Julius M. Samstein, June 7, 1963;
(e) James F. Thompson, June 8, 1963;
(f) Archer Columbus Black, June 8, 1963;
(g) Carl Vincent Hill, May 3, 1963;
(h) Jeanette Stockton Hume, May 4, 1963.

[fol. 4] The petitioners, James Arthur Cherry, Julius M. Samstein, and Willie Paul Berrien, Jr., were arrested on May 4, 1963 when they sought to obtain service, food, entertainment, and comfort at Davis House No. 3, Inc., d/b/a Davis Fine Food Cafeteria, a privately owned cafeteria-styled restaurant opened to the general public, on Marietta Street, Atlanta, Fulton County, Georgia.

Additionally, the following named petitioners were arrested at Davis House No. 3, Inc., d/b/a Davis Fine Food Cafeteria, a cafeteria-styled restaurant owned and operated, as aforesaid, and charged by special presentment of the July-August, 1963 Term, Grand Jury of Fulton County, Georgia, with violating the above-mentioned statute:

(a) Ralph M. Moore, May 1, 1963;
(b) Willie Paul Berrien, May 1, 1963;
(c) Willie Paul Berrien, June 6, 1963.

Petitioners, Anna Jo Weaver, Russell C. Campbell, and Allen Elliott, were arrested on April 30, 1963, when they sought to obtain service, food, entertainment, and comfort at the Ship Ahoy, Inc., a privately owned restaurant opened to the general public, located on Luckie Street, Atlanta, Fulton County, Georgia and charged by special presentment of the July-August, 1963 Term of the Fulton County Grand Jury with violating the above-mentioned statute.

The Petitioner, Carl C. Arnold, was arrested at the Ship Ahoy on May 23, 1963.
[fol. 5] Petitioner, Carl C. Arnold was arrested on May 1, 1963, and petitioner, Charles Edward Wells on May 1, 1963, and petitioner, Charles Edward Wells on May 4, 1963, when petitioners sought to obtain service, food, entertainment, and comfort at Davis Brothers, Incorporated, a privately owned restaurant opened to the general public, located on Luckie Street, Atlanta, Fulton County, Georgia, and charged by special presentment of the July-August, 1963 Term of the Fulton County Grand Jury with violating the aforementioned statute.

Petitioner, Willie Paul Berrien, Jr., was arrested on March 13, 1963 when he sought lodging, food, service, entertainment and comfort at the H. & G. Hotel Corporation, d/b/a Henry Grady Hotel, a hotel facility opened to the general public built on real estate owned by the State of Georgia but leased for a term of years to the H. & G. Hotel Corporation, located in Atlanta, Fulton County, Georgia, and charged by special presentment of the July-August, 1963, Term of the Fulton County Grand Jury with violating the aforementioned statute.

2. Subsequent to the petitioners' arrest, as aforesaid, the July-August, 1963 Term of the Fulton County Grand Jury returned special presentments against the petitioners charging them with violating Title 26, Georgia Code An-

notated, Section 3005, as aforesaid. The cases of the State of George vs. Thomas Rachel, et al., growing out of the aforesaid arrests and special presentments, are presently pending in the Superior Court of Fulton County, Georgia, to be heard during the week of February 17th through 22nd, 1964, the first case to be called for trial at 9:30 A. M. February 17, 1964.

[fol. 6] 3. By virtue of Title 28, United States Code Annotated, Section 1443(1) and (2), this Court has jurisdiction to hear and try the charges now pending against the petitioners. Removal is sought to protect the rights guaranteed the petitioners under the due process and equal protection clauses of Section 1, Fourteenth Amendment of the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment of the Constitution of the United States.

Moreover, petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States.

4. The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination.

5. Bond with good and sufficient surety is not required to be filed herewith, since the cases pending against the petitioners are criminal.

Further, since the petitioners are at liberty on bond, this Court is not required to issue its writ of habeas corpus to bring the petitioners before the Court.

[fol. 7] Wherefore, in view of these facts, petitioners pray that the aforesaid criminal proceedings may be removed

from the Superior Court of Fulton County to the United States District Court for the Northern District of Georgia, Atlanta Division, for trial and pray that said prosecution stand so removed as provided for in Title 28, United States Code Annotated, Section 1446 (c) and (d).

Donald L. Hollowell, Attorneys for Petitioners.

P. O. Address: 859½ Hunter St., N.W., Atlanta, Georgia 30314, 525-8372.

Duly sworn to by Howard Moore, Jr., jurat omitted in printing.

[fol. 9] Certificate of Service (omitted in printing).

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

Criminal No. 23,869

[Title omitted]

ORDER REMANDING CASE—February 18, 1964

In a petition for removal verified by counsel, filed in this Court on February 17, 1964, by the above named defendants, the petitioners allege:

That they are presently at liberty on bail on a charge of having violated Title 26, Georgia Code Annotated, § 3005; that they were arrested by members of the Police Department of the City of Atlanta and that "their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical [fol. 11] and psychological roots in the mores and attitudes which exist in the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially

discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

It is alleged that petitioner, William Paul Berrien, Jr., was arrested "when he sought lodging, food, service, entertainment and comfort at the H & G Corporation d/b/a Henry Grady Hotel" which is alleged to be a hotel facility open to the general public, built on real estate owned by the State of Georgia, but leased to said corporation. It is alleged that the other petitioners were arrested at specified privately owned restaurants and cafeterias in the City of Atlanta, all of the arrests being on specified dates in 1963 and it being alleged that all of petitioners were indicted by the July-August, 1963, Grand Jury of Fulton County, Georgia, for violation of said statute; that the cases are presently pending in the Superior Court of Fulton County, Georgia, and are set to be heard during the week of February 17 to February 22, 1964, "the first case to be called for trial at 9:30 A. M. on February 17, 1964."

Petitioners allege that this Court has jurisdiction to hear and try the charges presently pending against them by virtue of 28 United States Code Annotated § 1443(1) (2); That removal is sought to protect rights guaranteed to peti- [fol. 12] tioners under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment to the Constitution of the United States; that "petitioners are prosecuted for acts done under color of authority from the constitution and laws of the United States and for refraining to do an act which was, and is, inconsistent with the Constitution and Laws of the United States;" that they are denied and/or cannot enforce in the courts of the State of Georgia the specified rights claimed under the Constitution and laws of the United States, "in that, among other things, the State of Georgia by statute, custom, usage, and practice maintains a policy

of racial discrimination." Petitioners pray for removal of said criminal proceedings from the state court to this court for trial and "that said prosecutions stand so removed as provided for in Title 28, United States Code Annotated, Sec. 1446(c) (d)."

The criminal statute under which these movant defendants are indicted is § 26-3005 of the Georgia Code, which reads, as follows:

> "Refusal to leave premises of another when ordered to do so by owner or person in charge. It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or [fol. 13] such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

The defendants do not here contend that this statute is unconstitutional. The Supreme Court of Georgia has recently held that this statute does not violate the due process clause of the federal constitution. (1)

It is the duty of the district court to examine on its own motion the question of whether a case removed to it should be remanded to the state court without waiting for a motion to remand. (2.)

The removal statute—§ 1443, Title 28, U. S. C.—is to be strictly construed. (3.)

A criminal prosecution or a civil cause under this statute [28 U. S. C. § 1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending. The

1. Clark v. State of Georgia (28971), Supreme Court of Georgia—Case No. 22,323, decided Jan. 30, 1964.

2. In Re MacNeil Bros. Co. (CCA Mass. 1958) 259 F. 2d 386; Westark Production Credit Ass'n v. Fidelity & Deposit Co., (D.C. W.D. Ark. 1951) 100 F. Supp. 52, 56; Rand v. State of Arkansas (D.C. W.D. Ark. 1961) 191 [fol. 14] F. Supp. 20; Title 28, § 1447(c), U. S. C.

3. Shamrock Oil Corp. v. Sheets, 313 U. S. 100; City of Birmingham, Ala. v. Croskey, 217 F. Supp. 947.

statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are permitted by officers or individuals the remedy is the prosecution of the case to the highest court of the State and then to the Supreme Court of the United States as the laws of the United States authorize. The statute contemplates that during the trial of a particular case, the state court will respect and enforce the right of the defendant to the equal protection of the laws of the State or the constitutional laws of the United States. (4.)

The duty to enforce and protect every right granted and secured by the United States Constitution rests equally upon State and Federal Courts. (5.)

Considered in the light of the aforementioned authority, the petition for removal to this Court does not allege facts sufficient to justify the removal that has been effected.

Since the case was improperly removed to this Court, it is the duty of this Court to remand the same to the Superior Court of Fulton County, Georgia, § 1447(c), Title 28, U. S. C. and the defendants named in the above styled case are hereby required to report without delay to the [fol. 15] Superior Court of Fulton County, Georgia, and there attend from day to day thereafter as may be ordered by said Superior Court.

4. Hull v. Jackson County Circuit Court, (CCA Mich. 1943) 138 F. 2d 820; Rand v. State of Arkansas, supra, note 1; City of Birmingham, Ala. v. Croskey, supra, note 2;

People of State of California v. Lamson, 12 F. Supp. 813; 2 Cyc. of Fed. Procedure, Sec. 3.82.

5. Gibson v. State of Mississippi, 162 U. S. 565, 40 L. Ed. 1075; Ex Parte Royall, 117 U. S. 241, 248, 29 L. Ed. 868 at p. 870; Snypp v. State of Ohio, 70 F. 2d 535.

It is therefore Ordered, Adjudged and Decreed that the above styled case is hereby remanded to the Superior Court of Fulton County, Atlanta, Georgia.

This the 18th day of February, 1964.

Boyd Sloan, United States District Judge.

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

Criminal No. 23,869

[Title omitted]

NOTICE OF APPEAL—Filed: March 5, 1964

Notice is hereby given that Thomas Rachel, et al., plaintiffs in the above-stated case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, of February 18, 1964, dismissing their removal petition sua sponte. Said order was entered February 18, 1964.

Donald L. Hollowell, Howard Moore, Jr., Attorneys for Appellants.

[fol. 17] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 18]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23,869 Criminal

21354

THOMAS RACHEL, JERRY WALKER, LARRY CRAWFORD FOX, DEBBIE AMIS, WILLIE PAUL BERRIEN, JR., LYNN PFUHL, MICHAEL SAYER, JULIAN M. SAMSTEIN, RALPH M. MOORE, RONALD FRANKLIN TURNER, CARL C. ARNOLD, JAMES F. THOMPSON, ARCHER COLUMBUS BLACK, CARL VINCENT HILL, JEANETTE STOCKTON HUME, JAMES ARTHUR CHERRY, RUSSELL C. CAMPBELL, ALLEN R. ELLIOTT, ANNA JO WEAVER, and CHARLES EDWARD WELLS,

VS.

THE STATE OF GEORGIA.

MOTION TO DISMISS APPEAL—Filed March 12, 1964

Statement of the Case

On February 17, 1964, the above named defendants in a number of criminal cases then pending in Fulton Superior Court, Fulton County, Georgia, charging violations of Section 26-3005 of the Code of Georgia filed a petition for removal verified by counsel, relying upon Section 1443 (1) (2) Title 28, United States Code.

On February 18, 1964, Honorable Boyd Sloan, United States District Judge for the Northern District of Georgia, issued an opinion and order remanding all of said cases to the Superior Court of Fulton County, Atlanta, Georgia.

On March 5, 1964, petitioners filed a notice of appeal to this Court from the Order of Judge Boyd Sloan remanding said cases sua sponte.

Petitioners have now filed a motion for a stay of the proceedings in Fulton County Superior Court pending said Appeal from the Order remanding the cases for trial in the Fulton Superior Court.

[fol. 19] The State of Georgia moves to dismiss said Appeal on the following grounds:

1.

The notice of Appeal from the Order of February 18, 1964, remanding the cases was not timely filed, having been filed more than ten days from the date of said Order.

2.

The said Order of Judge Boyd Sloan remanding said cases to the State Court for trial is not reviewable by this Court on appeal or otherwise.

The State of Georgia also urges this Court to deny a stay of proceedings in the Fulton Superior Court because the Order of Remand is not appealable.

Argument and Authorities

This brief will be necessarily very sketchy since counsel for the State of Georgia has had less than twenty-four hours notice of the hearing before this Honorable Court. However, Section 1447, Title 28 United States Code reads in part as follows:

> "(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. June 25, 1948, c. 646, 62 Stat. 939, amended May 24, 1949, c. 139, Sect. 84, 63 Stat. 102."

In the limited time available, counsel for the State of Georgia has not been able to find any reported federal case holding contrary to the last quoted section. There are many federal decisions, however, holding that an Order of Remand to a State Court is not appealable. For example, in the case of *Aetna Casualty & Surety Co. et al.* v. *Flowers,*

1946, 330 U.S. 464, the United States Supreme Court [fol. 20] stated the following:

> "An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here."

Other recent federal decisions holding to the same effect are: Kromer v. McNabb, 10 Cir., 1962, 308 F.2nd 863; Hirsch v. Bruchhausen, 2 Cir., 1960, 284 F.2d 783; In Re Bear River Drainage District, 10 Cir., 1959, 267 F. 2d 849; and F & L Drug Corp. v. American Cent. Ins. Co., D C Conn. 1961, 200 F. Supp. 718.

It is also earnestly insisted by the State of Georgia that this notice of appeal was filed too late. These are criminal proceedings in the Georgia Court and have been removed to Federal Court as a criminal case and have been given a criminal number in the United States District Court. Therefore, the notice of appeal from the Order of Judge Sloan remanding the cases should have been filed within ten days from the date of his Order of February 18, 1964, pursuant to Rule 37 (a) (2) Federal Rules of Criminal Procedure. The cases were properly remanded to Fulton Superior Court. The State of Georgia also respectfully insists that the cases were properly remanded to the Fulton Superior Court for trial for the reasons set out by Judge Sloan in his five page opinion. The State of Georgia relies upon the authority cited by Honorable Boyd Sloan and will not repeat those authorities here for lack of time.

Wherefore, the State of Georgia prays:

1.

That the appeal of said petitioners from the Order of Remand be dismissed.

[fol. 21] 2.

That the stay requested by petitioners be denied.

3.

That the State of Georgia be permitted to file an original and four typewritten copies of this motion in lieu of having been printed because of want of time in which to have this motion printed pursuant to the rules of this Court.

Respectfully submitted,

William T. Boyd, Solicitor General, Atlanta Judicial Circuit, J. Robert Sparks, Assistant Solicitor General, A. J. C.

[fol. 22] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 23]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, *et al.*, Appellants,

v.

THE STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and Carswell, District Judge.

PER CURIAM ORDER STAYING ORDER OF REMAND OF DISTRICT COURT DATED FEBRUARY 18, 1964—March 12, 1964

This Court having heretofore, in the case of Congress of Racial Equality v. City of Clinton, Louisiana, granted a stay of the order of remand returning the said case to the

state courts of Louisiana, pending an appeal from such order of remand on the merits, we conclude that consistent with that order a stay should be granted to the appellants here.

The question of the appealability of an order of remand is presented in the C.O.R.E. case which will be promptly heard by this Court. We conclude that the effectiveness of the order of the District Court, dated February 18, 1964, remanding these cases to the Superior Court of Fulton County should be delayed pending a determination of the appeal on the merits.

[fol. 24] It is, therefore, Ordered that the said order of February 18, 1964, be and the same is hereby stayed pending final disposition of this appeal on the merits or the earlier order of this Court.

This 12th day of March, 1964.

Elbert P. Tuttle, United States Circuit Judge, John Minor Wisdom, United States Circuit Judge.

CARSWELL, District Judge, Dissenting:

Orders of remand are not appealable under the affirmative language of the statute, nor have the courts before this held them so to be. The nature of the particular case does not, in my view, afford legally sufficient cause to disturb this universally applied rule.

I would, therefore, grant appellee's motion to dismiss this appeal.

This 12th day of March, 1964.

G. Harrold Carswell, United States District Judge, Northern District of Florida.

[File endorsement omitted]

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

No. 23,869

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed April 6, 1964

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the defendants-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by Notice of Appeal filed March 5, 1964, the following portions of the record and proceedings in the action:

1. Notice of Appeal filed March 5, 1964.
2. Verified Removal Petition filed February 17, 1964.
3. Order of Remand filed February 18, 1964.
4. Motion for Stay Pending Appeal filed March 12, 1964.

[fol. 26] 5. Per Curiam Order of the United States Court of Appeals for the Fifth Circuit staying effect of the Order of Remand.

6. This designation.

This 6th day of April, 1964.

Donald L. Hollowell, Howard Moore, Jr., Attorneys for Appellants.

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

STATEMENT OF POINTS—April 6, 1964

The following constitute the points on which the appellants here will rely on appeal:

1. Mode of proceeding and time of filing notice of appeal from a remand order issued sua sponte and without hearing is governed by Rule 73 (a) and (b) of the Federal Rules of Civil Procedure.

2. Title 28, United States Code Annotated, Section 1447 (d), is not applicable to an appeal taken from a remand order issued sua sponte on a verified removal petition [fol. 27] upon a determination that the petition for removal failed to state a removal cause under Title 28, United States Code Annotated, Section 1443 (1) and (2).

3. Title 28, United States Code Annotated, Section 1447 (d), is not a bar to an appeal taken from a remand order in proceedings removed to the United States District Court pursuant to Title 28, United States Code Annotated, Section 1443 (1) and (2).

4. The petition for removal made a short and plain statement of facts sufficient to state a cause cognizable under Title 28, United States Code Annotated, Section 1443 (1) and (2).

5. The Court below erred in remanding the cases without first holding a hearing to ascertain the validity of the factual allegations.

This 6th day of April, 1964.

Donald L. Hollowell, Howard Moore, Jr., Attorneys for Appellants.

[fol. 28]

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

CROSS-DESIGNATION OF RECORD ON APPEAL—
Filed April 8, 1964

The State of Georgia, Appellee, hereby designates for inclusion in the record on appeal to the United States

Court of Appeals for the Fifth Circuit, to-wit No. 21354, the following portions of the record and proceedings:

1. Copy of Motion to Dismiss Appeal, the original of which was filed in the United States Court of Appeals for the Fifth Circuit on March 12, 1964, and a copy of which is on file with the Clerk of this Court.
2. This Cross-Designation of Contents of Record on Appeal.
3. All portions of the record previously designated by the Designation of Record on Appeal filed by Appellants on April 6, 1964.

[fol. 29] This 8th day of April, 1964.

William T. Boyd, Solicitor General, A.J.C., J. Robert Sparks, Asst. Sol. Gen., A.J.C., Attorneys for Appellee.

Third Floor Courthouse, Atlanta, Georgia 30303, JA 2-5310.

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLEE ON APPEAL

The State of Georgia, Appellee, will rely upon the following points on appeal before the United States Court of Appeals for the Fifth Circuit in the above captioned case:

1.

On the merits of the Appeal of United States District Judge Boyd Sloan's Order of February 18, 1964, remanding the above case to the Superior Court of Fulton County,

[fol. 30] Georgia, the Petition of Removal dated February 17, 1964, does not setout legally sufficient cause to justify the removal of these State Court criminal prosecutions to Federal Court.

2.

Said Petition for Removal filed February 17, 1964, is legally insufficient in that it did not have attached thereto a copy of each indictment sought to be removed as to each of said twenty (20) defendants, and such copy has not yet been filed as of this date in the United States District Court for the Northern District of Georgia as provided in Section 1446, Title 28 U.S.C.

3.

On the Motion to Dismiss Appeal heretofore filed by Appellee with the Fifth Circuit Court of Appeals on March 12, 1964, a copy of which is on file in the office of this Court, said appeal should be dismissed because the Notice of Appeal from the Remand Order of District Judge Boyd Sloan dated February 18, 1964, was not timely filed, having been filed more than ten (10) days from the date of said Order, to wit, on March 5, 1964, no extension of time having been granted by the District Court for filing a Notice of Appeal, and that the permissible time in which a Notice of Appeal can be filed is governed by Rule 37 (a) (2), Federal Rules of Criminal Procedure, said case being a criminal action.

[fol. 31] 4.

Aforesaid Motion to Dismiss Appeal should be granted because the aforesaid Remand Order of District Judge Boyd Sloan dated February 18, 1964, is not reviewable on appeal or otherwise pursuant to Section 1447 (d), Title 28, U.S.C.

5.

Even if the process of removing the above criminal case from State to Federal Court be construed as a civil action, *ad arguendo* as contended by Appellants, the appeal should

be dismissed because the Appellants have not complied with the requirement of Section 1446 (d), Title 28, U.S.C., which requires that every Petition for Removal of civil action shall be accompanied by a bond with good and sufficient surety for the payment of costs, and the record in the United States District Court does not show that any such bond has been posted for any defendant named in the Petition for Removal.

6.

The Remand Order of District Judge Boyd Sloan was correct as a matter of law and there was no necessity nor requirement for said Court to hold a hearing to ascertain the validity of the factual allegations.

[fol. 32] This 8th day of April, 1964.

William T. Boyd, Solicitor General, A.J.C., J. Robert Sparks, Asst. Sol. Gen., A.J.C., Attorneys for Appellee.

[fol. 33]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

THOMAS RACHEL, *et al.*,

No. 21354 versus

THE STATE OF GEORGIA.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
October 2, 1964

On this day this cause was called, and after argument by Anthony G. Amsterdam, Esq., for Appellants, and by J. Robert Sparks, Esq., Asst. Solicitor General of Georgia, and Albert Sidney Johnson, Esq., Asst. Attorney General of Georgia, for Appellees, was submitted to the Court.

[fol. 34]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 21354

THOMAS RACHEL, *et al.*, Appellants,

versus

STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

OPINION—March 5, 1965

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

TUTTLE, Chief Judge: This is an appeal by the named appellant and 19 other persons charged with the violation of Georgia's so-called anti-trespass statute, Title 26 Georgia Code Annotated, Section 3005, from an order entered by the district court without a hearing remanding the cases for trial to the state court after they had been removed [fol. 35] by a petition for removal filed pursuant to Title 28 U.S.C.A. §1443(1) and (2) (the Civil Rights Removal Sections). Having held, in the case of *Congress of Racial Equality, et al.* v. *Town of Clinton, Parish of East Feliciana*, 5 Cir., 1964, —— F. 2d ——, that the enactment of the Civil Rights Act of 1964 resolved the question of appealability of remand orders as to cases removed to the Federal

District Courts under Section 1443, *supra*,[1] we turn directly to the merits of the appeal.[2]

[fol. 36] The question to be resolved on the merits of the appeal is whether the petition for removal in this case adequately stated a basis for removal under the indicated sec-

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[1] Prior to the enactment of Section 901 of the Civil Rights Act of 1964, Title 28 U.S.C.A. §1447(b) on its face seemed to prohibit an appeal from an order of remand. It provided: "an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." Notwithstanding the provisions of that statute, however, a substantial question had been raised in the *CORE* case, supra, and in this case when this Court originally granted a stay of the remand order pending appeal whether the express provisions of 1447(b) applied to Civil Rights cases. We discussed this issue in the *CORE* case. This discussion need not be repeated by reason of the fact we have now determined that whether or not remand orders in such cases were appealable before the passage of the Civil Rights Act, the adoption of that Act by Congress forecloses the issue in favor of appealability.

[2] The appellee's contention that this appeal is untimely has no merit. The notice of appeal was filed sixteen calendar days after the order appealed from, and it could only be considered untimely if the ten-day time limit of Fed. R. Crim. P. 37(a)(2) were applicable. It is absolutely clear, however, that Rule 37 has no application here.

The Supreme Court promulgated Rules 32 through 39, without submitting them to Congress, under the authority of the Criminal Appeals Rules Act. Act of Feb. 24, 1933, c. 119, 49 Stat. 904, as amended, 18 U.S.C. §3772. The only power given under that Act was to prescribe rules of procedure "with respect to any or all proceedings *after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty . . . .*" (Emphasis added.) When it adopted the predecessor to Rule 37(a)(2), see 292 U.S. 661, 662, and when it promulgated that Rule in its present form, see 327 U.S. 825, the Supreme Court made it explicit that the Rule was meant to apply only to criminal appeals "after verdict, or finding of guilt . . . or plea of guilty."

The question whether the predecessor to Rule 37(a)(2) applied to a criminal appeal prior to verdict—in that case an appeal from an adjudication of criminal contempt—was squarely decided in *Nye* v. *United States*, 1941, 313 U.S. 28, 43-44. Rejecting the argument that the Criminal Rules applied to all cases that could be categorized as "criminal", the Court held that the history and the language of the order promulgating the Rule required that

tion of the removal statutes. Title 28 U.S.C.A. §1443, provides as follows:

"§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place where it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing [fol. 37] to do any act on the ground that it would be inconsistent with such law."

The meaning of this statute, passed in a package with the first post-bellum Civil Rights Act, Act of April 9, 1866, 14 Stat. 27, has been the subject of debate since its passage. It was originally construed to cover cases in which the de-

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it be applied only "with respect to any or all proceedings *after verdict* in criminal cases." (Emphasis added.)

In 1940, Congress authorized the Supreme Court to prescribe rules of procedure in criminal proceedings "prior to and including verdict." Act of June 29, 1940, c. 445, 54 Stat. 688, as amended, 18 U.S.C. §3771. Rules 1-31 and 40-60 were promulgated under the authority of this Act. It is clear that Rule 37(a)(2) can find no authority in this statute. Not only was it expressly prescribed under the "after verdict" enabling act, see 327 U.S. 825, but, as authorized in that act, it was never submitted to Congress. Under the "prior to verdict" enabling act, no rule could become effective unless submitted to Congress for its acquiescence. Only Rules 1-31 and 40-60 were so submitted. See 327 U.S. 824; Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L.J. 197, 230 (1947).

fendant alleged his inability to obtain a fair trial due to such informal impediments as local prejudice. *State* v. *Dunlap*, 1871, 65 N.C. 491; see also *Ex parte Wells*, 3 Woods 128, quoted in *Kentucky* v. *Powers*, 1906, 201 U.S. 1, 27 (Bradley, J., on circuit).

Later, the view was taken that only formal impediments, stemming from State legislation, could give rise to such deprivations of equal civil rights as would allow a defendant to invoke federal jurisdiction by removal. *Kentucky* v. *Powers*, 1906, 201 U.S. 1. As this latter view was the latest Supreme Court pronouncement directly on the matter, the district court in the present case felt bound by it. In remanding the case to the State court, the district court states that "A criminal prosecution or a civil case under this statute [28 U.S.C.A. §1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending."

In delineating the scope of the civil rights removal statute for the first time, the Supreme Court placed great stress on the necessity that the denial of protected rights be made to appear in advance of trial, *Virginia* v. *Rives*, 1879, 100 [fol. 38] U.S. 313. By way of illustration, the Court indicated that denials of equal rights at the hands of court officials, occurring during trial, could not be cured by removal but that such denials under state legislation could be safeguarded against in this manner. It has been argued that, under a realistic appraisal of the facts in a given case, the Supreme Court today would recognize the right to removal under §1443(1) even where no legislative denial of rights is shown. See Krieger, "Local Prejudice and Removal of Criminal Cases From State to Federal Courts," 19 St. John's L. Rev. 43 (1944); Note, "Local Prejudice in Criminal Cases," 54 Harv. L. Rev. 679, 685-86 (1941). Such a recognition by the Court thus would reemphasize the putative essence of *Virginia* v. *Rives*—that the denial of equal rights must be susceptible of demonstration before trial—and minimize the illustrative language in that case dealing with state legislation.

We have been asked by the appellants to anticipate such an interpretation of §1443 by the Supreme Court; however, there is no reason for us to reach that question in this case. This is so for two reasons. First, the petition in this case did allege the denial of protected rights by State legislation. Secondly, the passage of the Civil Rights Act of 1964 and its interpretation in *Hamm* v. *City of Rock Hill*, 1964, —— U.S. ——, provide a different, and narrower, ground on which this case may be disposed of.

After alleging the specific facts respecting the arrests of each of the 20 persons, including allegations that each of them was, when arrested, seeking food or accommoda- [fol. 39] tions at a restaurant or hotel, the petitioners alleged that each of their acts had been followed by special Grand Jury presentments charging them with violating the named section of the Georgia Code, and that the said presentments were pending in the Superior Court of Fulton County and were to be heard within a few days if not transferred. They then alleged the following:

> "(3) By virtue of Title 28, United States Code Annotated, Section 1443(1) and (2), this Court has jurisdiction to hear and try the charges now pending against the petitioners. Removal is sought to protect the rights guaranteed to petitioners under the due process and equal protection clauses of Section 1, Fourteenth Amendment of the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment of the Constitution of the United States.
>
> "Moreover, petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States.
>
> "(4) The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under

the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by *statute*, [fol. 40] custom, usage, and practice supports and maintains a policy of racial discrimination." (Emphasis added).

The district court apparently decided that, since the removal petition did not expressly allege that Section 26-3005 was unconstitutional on its face, the petition failed to allege adequately that "the destruction of" the right to equal protection granted by the United States Constitution was caused by "statutory laws of the State" of Georgia. The allegation contained in paragraph 4 of the petition for removal, quoted above, that petitioners were denied their rights under the constitution and laws of the United States because the State of Georgia "by statute . . . supports and maintains a policy of racial discrimination," however, clearly asserts the precise ground for removal that the trial court said was required. This would not be so, of course, if a petition for removal, unlike other pleadings under the Federal Rules of Civil Procedure, must contain something more than the bare bones allegation of the existence of a right. As to this matter, we have no doubt that the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings, which, according to Rule 8(f) of the Federal Rules of Civil Procedure, "shall be so construed as to do substantial justice." The statute requires that the petition for removal contain "a short and plain statement of the facts which entitle him or them to removal." 28 U.S.C.A. §1446. The Supreme Court has held that the removal must be effected by the filing of "a verified petition setting forth, agreeably to the ordinary rules of [fol. 41] pleading, the particular facts, not already appearing, out of which the right arises." *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 1914, 232 U.S. 146, 151. It is plain, therefore, that the petition is to be construed "agreeably to

the ordinary Rules of pleading" since in fact the petition for removal is the basis for the federal court's jurisdiction and it is a pleading of the facts necessary to vest jurisdiction in the federal court.

In *Allman* v. *Hanley*, 5 Cir., 1962, 302 F. 2d 559, 562, this Court said:

> "The absence of detailed grounds setting forth basis for removal is not fatal to defendants' right to remove. We think that the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient. Title 28, United States Code, Section 1446(a) requires only a short, plain statement of facts entitling a defendant to removal."

This is in line with this Court's construction of the Federal Rules of Civil Procedure relating to the liberality of pleadings under the rules. If a petition for removal states sufficient in the way of allegations to support proof of adequate grounds for removal, it is to be treated in the same manner as a complaint in federal court. As to such a pleading, this Court has frequently reiterated what we said in *Des Isles* v. *Evans*, 5 Cir., 1952, 200 F. 2d 614, 615, in quoting Moore's Federal Practice:

> "The courts have ruled time and again that a motion to dismiss for failure to state a claim should not be [fol. 42] granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

In that case we also quoted from an opinion by this Court in *De Loach* v. *Crowley's Inc.*, 5 Cir., 1942, 128 F. 2d 378, 380:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the

pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings."

We conclude, therefore, that this petition for removal adequately alleged that the appellants suffered a denial of equal civil rights by virtue of the statute under which they were being prosecuted in the State court. Unless there is patently no substance in this allegation, a good claim for removal under §1443(1) has been stated. That the allegation does not lack substance may be seen from a consideration of the Civil Rights Act of 1964, as construed by the Supreme Court.

Statutes of South Carolina and Arkansas, substantially the same as the Georgia statute involved here, were before the Supreme Court in *Hamm* v. *City of Rock Hill, supra.* Having upheld the constitutionality of Title II (Public Accommodations) of the Civil Rights Act of 1964 both as respects businesses serving interstate travelers and businesses of a more local nature a substantial part of whose products have moved in commerce, *Heart of Atlanta Motel,* [fol. 43] *Inc.* v. *United States,* 1964, —— U. S. ——; *Katzenbach* v. *McClung,* 1964, —— U.S. ——, the Court in *Hamm* held that prosecutions under State anti-trespass statutes may not stand if the denial of service or the request for removal from the premises was based upon an intent to discriminate against the arrested persons on account of race. The Court ruled that "The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage." The Court further said:

> "In short, now that Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and has declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the peti-

tioners. And in accordance with the long established rule of our cases they must be abated and the judgment in each is therefore vacated and the charges are ordered dismissed."

In the removal petitions in the cases pending before this Court, it is explicitly alleged that the arrests of appellants "were effected for the sole purpose of aiding, abeting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and [fol. 44] attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race." These are allegations of fact, which if true, place these prosecutions by the State of Georgia squarely within the principle announced by the Supreme Court in *Hamm* v. *City of Rock Hill.*

In its opinion, the Supreme Court pointed out that no State may now prosecute Negroes who were charged with having refused to leave premises in accordance with the provisions of the Georgia statute where the request to leave was based upon a policy of racial discrimination. The Court pointed out that Section 203 of the Act provides:

> "No person shall (a) withhold, deny or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by Section 201 or 202, or (b) intimidate, threaten or coerce any person with the purpose of interfering with any right or privilege secured by Section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured* by Section 201 or 202." (Emphasis in Supreme Court opinion).

[fol. 45] The Court said, "On its face, this language prohibits prosecution of any person for seeking service in a covered establishment because of his race or color." The Court then proceeded to apply this prohibition to pending as well as prospective prosecutions. If therefore, the arrests and prosecutions of the appellants "were effected for the sole purpose of aiding, abetting and perpetuating customs . . . with respect to serving and seating members of the Negro race" in the respective restaurants "upon a racially discriminatory basis," as alleged, then under the holding of the Supreme Court these prosecutions will have to be abated.

Because of the Civil Rights Act of 1964, Title II, and its recent interpretation by the Supreme Court, we hold that the allegations of these petitions are sufficient to invoke federal jurisdiction under 28 U.S.C.A. §1443(1). That statute provides, as it has provided since its enactment in 1866, a federal forum in civil actions and criminal prosecutions to vindicate, in certain circumstances, rights "under any law providing for the equal civil rights of citizens of the United States." When the removal statute was originally enacted, the "law providing for . . . equal civil rights" most clearly contemplated was found in sections 1977 and 1978 of the Revised Statutes, *Strauder* v. *West Virginia,* 1879, 100 U.S. 303, 311. These sections formed part of the 1866 Civil Rights Act along with the removal provisions. In unholding the constitutionality of the removal statute, the Supreme Court made it clear that that act was merely one legitimate way for Congress to ensure the effectiveness of the substantive provisions of the civil rights laws. *Strauder* v. *West Virginia, supra,* [fol. 46] at 310-12. The Court said, "A right or an immunity, whether enacted by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. . . . And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case

from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sec. 641 [now §1443(1)] is such a provision." See also *Virginia* v. *Rives*, 1879, 100 U.S. 313, 318.

From its inception, then, the civil rights removal statute has been, as its language plainly contemplates, an adjunct to the substantive civil rights statutes enacted by Congress. The history of the several codifications and recodifications of sections 1977 and 1978, of the several amendments and enlargements upon these seminal civil rights laws, and of the parallel codifications and recodifications of the removal statute which is presently 28 U.S.C.A. §1443(1) amply supports this view of the tenor of the statutory language. (The history of these provisions is easily traceable through annotations in U.S.C.A.). It can not be doubted that §1443(1) is today an adjunct of the Civil Rights Act of 1964. See *New York* v. *Galamison*, 2nd Cir., 1965, —— F. 2d ——, 33 U. S. Law Week 2389". Particularly is this so in light of the references to the provision of a federal forum on removal for the protection of substantive civil rights in the act itself, Title IX, §901, and in its legislative history. See House [fol. 47] Judiciary Committee Report reprinted in BNA, The Civil Rights Act of 1964, pp. 286-87; remarks of Senator Dodd, 110 Cong. Rec. 6739 (daily ed. April 6, 1964).

Congress, while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those rights and immunities in a federal forum. The provision of this protective forum is not limited by the States' obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all—except that of the Supreme Court—because State courts are required to protect federally created rights. Nevertheless, the power of Con-

gress to provide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting §1443 (1).

The federally guaranteed right and immunity here pertinent were elucidated by the Supreme Court in *Hamm* v. *City of Rock Hill, supra,* as follows:

> "[T]he language of §203(c) supports a conclusion that non-forcible attempts to gain admittance or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a 'right or privilege' secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those [fol. 48] who pursue the statutory remedies. The legislative history specifically notes that the Act would be a defense to criminal trespass, breach of the peace and similar prosecutions."

Under the allegations of the petitions in the present case, these appellants have been denied, because of State legislation, "a right under . . . [a] law providing for the equal civil rights of citizens of the United States." They are entitled to a federal forum as provided for in 28 U.S.C.A. Sec. 1443(1) in which to prove these allegations. If the allegations are proved, then the federal court acquires jurisdiction for all purposes. Under normal circumstances the state prosecutions would then proceed in the federal court. Here, however, the finding of the jurisdictional fact immediately brings the *Hamm* case into play. The same fact determination requires dismissal rather than further prosecution in the District Court.[8]

Upon remand, therefore, the trial court should give appellants an opportunity to prove the allegations in the removal petition as to the purpose for the arrests and prosecutions, and in the event it is established that the

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[8] In light of the view we have taken of this case, it is unnecessary to review the appellants' contention that they are also entitled to removal under 28 U.S.C.A. §1443(2).

removal of the appellants from the various places of public accommodation was done for racial reasons, then under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings.

Concluding, as we do, that the petition for removal alleges sufficient grounds showing a denial of the civil [fol. 49] rights of the appellants in the state courts by reason of the State statute, it follows that the order of remand was in error and it must be reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

BELL, Circuit Judge, concurring in part and dissenting in part:

I regret that I cannot concur altogether in the opinion of the majority. The reasoning preliminary to the holding therein seems to embrace the following steps. We begin with the jurisdictional base, i.e., the removal statute. 28 USCA, § 1443(1). Next, the case of *Kentucky* v. *Powers*, 1906, 201 U.S. 1, is cited for authority that the removal statute is limited to those situations where a state law gives rise to the deprivation of equal civil rights by reason of which a defendant seeks to invoke federal jurisdiction. Then the removal petition itself is construed, and the conclusion reached that appellants do indeed assert that they were being denied their equal civil rights in the state court because of a Georgia statute. The fact that the statute is nowhere specified is met by applying the philosophy of federal notice type pleading to the bare allegation of the removal petition, to the end of assuming that the petition referred to Georgia Code 26-3005, the anti-trespass statute.[1] It is also [fol. 50] assumed that appellants will claim on hearing that

[1] It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises

the statute is either unconstitutional on its face or as applied by the state court to appellants. The unconstitutionality in application may be claimed on the holding of the Supreme Court in *Hamm* v. *City of Rock Hill*, 1964, —— U.S. ——, —— S.Ct. ——, 13 L.Ed.2d 300, in its retroactive application of the Civil Rights Act of 1964 for reason of national policy to the socalled sit-in cases. That case protects persons engaged in peaceable sit-ins in restaurants covered by the Act from prosecution.

Thus, the majority concludes that the removal petition may fairly be read as alleging a valid claim for removal under 28 USCA, § 1443(1). And up to this point, I am in agreement with the majority. That is, I agree that the removal petition may now be read to allege that appellants are unable to enforce in the Georgia courts the right, conferred by the Civil Rights Act of 1964 as construed by *Hamm* v. *City of Rock Hill*, to be free from prosecution under state trespass statutes for peaceful sit-in demonstrations. The fact is that appellants were being prosecuted under such a statute, viz., Ga. Code § 26-3005. Therefore I also agree that the District Court erred in remanding to the state court without a hearing. However, I wish to disassociate myself from that part of the holding as to how these cases are to be treated on remand to the District Court.

We should reverse and remand for a hearing on the question of jurisdiction. But, the majority states, and this [fol. 51] is where I disagree, that upon remand the trial court should give appellants the opportunity to prove their allegations as to the purpose of the arrests and prosecutions, and in the event the refusal of service in places of public accommodation was for racial reasons, then under the authority of the *Hamm* case it would become the duty of the District Court to dismiss the prosecutions.

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or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Ga. Laws 1960, p. 142)

If this is all that remains for consideration on remand, the holding of the majority is tantamount to applying *Hamm* v. *Rock Hill* in all its sweep against trespass statutes, retroactively to the State of Georgia. It is, in effect, a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of the Supreme Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the state courts and even though the state courts have not had an opportunity to deal with these cases in the light of *Hamm*. In dispensing with the requirement that appellants prove on remand that the Georgia courts will not accord them their rights under the *Hamm* decision, the theory of the majority must be that *Hamm* has tainted these prosecutions *ab initio*, and hence jurisdiction in the federal court has been established retroactively by the very fact that the prosecutions were ever commenced. This casual treatment of the Georgia co is a striking departure from my concept of Federalism and from the duty which I think comity imposes upon us with regard to that system.

The fact is that the Supreme Court had never, before and absent *Hamm* and the 1964 Civil Rights Act, held the use of state trespass statutes under the circumstances here pre- [fol. 52] sented to be unconstitutional. This was one of the problems that the Civil Rights Act sought to obviate. See the following cases where the question was pretermitted: *Griffin* v. *Maryland*, 1964, —— U.S. ——, 84 S.Ct. 1770, 12 L.Ed.2d 754; *Barr* v. *Columbia*, 1964, —— U.S. ——, 84 S.Ct. 1734, 12 L.Ed.2d 766; *Robinson* v. *Florida*, 1964, —— U.S. ——, 84 S.Ct. 1693, 12 L.Ed.2d 771; *Bell* v. *Maryland*, 1964, —— U.S. ——, 84 S.Ct. 1814, 12 L.Ed.2d 822; and *Bouie* v. *Columbia*, 1964, —— U.S. ——, 84 S.Ct. 1697, 12 L.Ed.2d 894. We recognized this fact in *Poole* v. *Barnett*, 5 Cir., 1964, 336 F.2d 267. It is now undoubtedly true that the 1964 Civil Rights Act and the *Hamm* decision have placed a gloss on state trespass statutes so that they may not be applied against those peaceably seeking service in restaurants covered by the Act, or against those whose prosecutions for such activity were pending at the time of

the passage of the Act. However, in view of this gloss being of a supervening nature, I would give the Georgia court from whence these cases were removed a chance to apply the *Hamm* doctrine unless appellants can demonstrate on remand to the District Court that the Georgia court would not fairly accord them their rights under *Hamm*.

Thus, on remand the District Court should first determine just what appellants do claim under the present allegations of their notice type pleading. If they contend that the statute is unconstitutional in its application to them by the state, by virtue of the *Hamm* case or otherwise, then the question will arise whether the state in fact seeks to apply the statute in an unconstitutional manner. If it appears, and the burden would be on appellants to show [fol. 53] this, that the state will apply the statute contrary to the teachings of *Hamm*, the District Court should deny remand and retain the cases for disposition; otherwise, the cases should be remanded.

I doubt that appellants can point to any right that would be jeopardized by remand to the state court. The Supreme Court of Georgia has already applied *Hamm* to a group of sit-in convictions with the result of abating the conviction and ordering the cases dismissed. *Holton, et al.* v. *State of Georgia*, No. 22,810, decided February 8, 1965. Such jeopardy as may be involved is jeopardy to our dual system of courts, federal and state. And a federal court should not lightly intrude into a sphere of activity left to state and local government under the Constitution: the maintenance of local order. Because the decision of the majority goes to the point of vesting jurisdiction in the federal court retroactively, a step further than the Supreme Court went in *Hamm*, I respectfully dissent.

WHITEHURST, District Judge, concurring in part and dissenting in part:

I concur in Judge Tuttle's opinion on the merits. However, the Notice of Appeal having been filed six days later than permitted under Rule 37(a)(2) of the Rules of Criminal Procedure, I would dismiss the appeal.

[fol. 54]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21354

D. C. Docket No. 23,869

THOMAS RACHEL, *et al.*, Appellants,

versus

STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, Bell, Circuit Judge, and Whitehurst, District Judge.

JUDGMENT—March 5, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, State of Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Bell, Circuit Judge, concurring in part and dissenting in part".

"Whitehurst, District Judge, concurring in part and dissenting in part".

March 5, 1965

Issued as Mandate:

[fol. 55]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,354

[Title omitted]

Appeal from the United States District Court for the Northern District of Georgia.

PETITION FOR REHEARING EN BANC—Filed March 25, 1965

Pursuant to Rule 29 of this Court, as amended, the State of Georgia, Appellee, respectfully files its Petition for Rehearing En Banc, within the time allowed by said Rule, from the judgment entered by this Court on March 5, 1965, reversing the Order of Remand appealed from, and remanding the case to the District Court for further proceedings. The Petition for Rehearing En Banc is based upon the following grounds:

Ground I

The majority of the Court, District Judge Whitehurst dissenting, erred in failing to grant the Motion to Dismiss Appeal filed by Appellee, based on the ground that the Notice of Appeal from the Order of Remand was not timely filed, having been filed more than ten days from the date of the entry of the Order of Remand.

[fol. 56]

Ground II

The majority of the Court, District Judge Whitehurst dissenting, erred in considering and deciding the appeal on its merits where the Notice of Appeal was filed sixteen calendar days after the entry of the Order of Remand appealed from.

Ground III

The majority of the Court, District Judge Whitehurst dissenting, erred in holding that the ten day time limit

for filing of the Notice of Appeal after entry of the Order of Remand appealed from, which is prescribed by Rule 37 (a) (2), Fed. R. Crim. P., has no application to this case.

Ground IV

The majority of the Court, District Judge Whitehurst dissenting, erred in holding that Rule 37 (a) (2), Fed. R. Crim. P. in its present form applies only to criminal appeals "after verdict or finding of guilt . . . or plea of guilty."

Ground V

The Court erred in holding, upon the merits, that the Petition for Removal did in fact allege the denial of protected rights by State legislation.

Ground VI

The Court erred in holding upon the merits, that a Petition for Removal, like other pleadings under the Federal Rules of Civil Procedure, need contain only the "bare bones allegation of the existence of a right."

Ground VII

The Court erred in holding that the Petition for Removal adequately alleged that the Appellants suffered a denial [fol. 57] of equal rights by virtue of the statute under which they were being prosecuted in the State court.

Ground VIII

The Court erred in holding that the Petition for Removal alleges a valid claim for removal under Section 1443 (1), Title 28, U.S.C.

Ground IX

The Court erred in holding that the Appellants are entitled to a hearing in a federal forum for the purpose of proving their allegations of denial of rights under a law

providing for their equal rights because of State legislation, and in holding that the District Court erred in remanding said cases to the State Court without such a hearing.

Ground X

The majority of the Court, Circuit Judge Bell dissenting, erred in holding that, if upon a hearing before the District Court it is established that the removal of Appellants from the various places of public accommodation was done for racial reasons, it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings.

Ground XI

The majority of the Court, Circuit Judge Bell dissenting, erred in holding that the United States Supreme Court case of *Hamm* v. *City of Rock Hill,* 1964, 33 U.S. Law Week 4079, requires a dismissal of the prosecutions by the Federal District Court solely upon proof that racial reasons were the cause of the removal of Appellants from [fol. 58] the places of public accommodation. The majority of the Court erred herein by leaving no discretion in the District Court to consider whether the evidence adduced in the hearing places these cases within the purview of *Hamm* and by imposing no burden upon Appellants to prove that the State Court would not apply the doctrine of *Hamm* fairly to Appellants if the cases were remanded to the State Court.

Ground XII

The Court erred in reversing the Order of Remand of the District Court.

Brief in Support of Petition for Rehearing En Banc

With one exception, all of the Grounds raised by this Petition have been exhaustively briefed by both parties and argued at length before this Court. Therefore, Ap-

pellee will confine its citation of authorities for the most part to pointing out cases and factors apparently overlooked by the Court.

Grounds I, II, III, and IV

These Grounds all deal with the failure of the majority of the Court to grant Appellee's Motion to Dismiss Appeal, and the action of the majority of the Court in considering the appeal on its merits, holding that Rule 37 (a) (2), Fed. R. Crim. P. has no application to this case and holding that said Rule in its present form applies only to criminal appeals after verdict, or finding of guilt . . . or plea of guilty. Appellee respectfully contends that Rule 37 (a) (2) does control the time limit of ten days from the entry of the Remand Order for the filing [fol. 59] of the Notice of Appeal in this case, and further contends that said Rule does apply, in its present form, to orders entered in criminal cases *prior to* verdict, finding of guilt or plea of guilty.

The majority of this Court held the appeal in this case to be timely, though admittedly not filed within ten days, by holding that Rule 37 had no application to any criminal case except after verdict, finding of guilt, or plea of guilty.

This contention was never urged or suggested by Appellants before this Court, either in their very thorough and lengthy brief or in extended oral argument. Therefore, counsel for Appellee will discuss this point in greater detail than will be devoted to other grounds of this Petition.

Appellee respectfully insists that certain material factors were overlooked by the majority of the Court in holding that Rule 37 (a) (2) is limited in its application to appeals from judgments and orders in criminal cases after verdict, finding of guilt or plea of guilty. The last sentence of Rule 37 (a) (2) itself demonstrates clearly the fallacy of the majority ruling. This sentence is worded as follows:

"Rule 37. Taking appeal; and Petition for Writ of Certiorari

(a) Taking Appeal to a Court of Appeals

(2) . . . An appeal by the government when authorized by statute shall be taken within 30 days after entry of the judgment or order appealed from."

[fol. 60] Since the government has absolutely no power of appeal in criminal cases after verdict, finding of guilt or guilty plea, it seems absolutely clear that Rule 37 (a) (2) *must* control appeals of "prior to verdict" judgments and orders. To hold otherwise would be to hold that half of the paragraph (that portion setting out the 10 day limitation on appeals by *defendants*) applies to "after verdict" cases while the final sentence of said paragraph applies to "before verdict" orders and judgments when the government wishes to appeal. This would be a most novel construction of a procedural rule!

The government can only appeal judgments and orders in criminal cases in very few instances, including the dismissal of an indictment *before trial*, and the suppression of evidence *before trial* in a narcotics case. Never can the government appeal a verdict of not guilty! Appellee therefore respectfully requests the majority of the Court to reconsider its construction of this Rule in light of the last sentence. If Rule 37 (a) (2) is restricted to "after verdict" appeals, the last sentence thereof is completely without meaning when the government wishes to appeal.

Secondly, the majority of this Court has completely overlooked Rule 54 (b) (1), Fed. R. Crim. P., which expressly makes the Federal Rules of Criminal Procedure, including Rule 37, applicable to all procedure in criminal prosecutions removed to Federal District Courts from State Courts, as follows:

"Rule 54. Application and Exception

(a) . . .

[fol. 61] (b) Proceedings

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and *govern all procedure after removal,* except that dismissal by the attorney for the prosecution shall be governed by state law." (Italics added)

The Court in its majority opinion on this point correctly notes that Rules 1-31 and 40-60 (which includes 54, of course) were promulgated by the Supreme Court under the "prior to verdict" enabling Act of June 29, 1940, 54 Stat. 688, and were properly submitted to Congress. Thus, this Rule expressly states that "these Rules" govern all procedure after removal in precisely the same special class of cases (removed criminal prosecutions) as the ones in the instant case.

Further, it is important to note that the predecessor to Rule 37, which was Rule III, had been in effect long before Rule 54 was promulgated. Old Rule III became effective on September 1, 1934 (292 U.S. 661). Rule 54, among others, was promulgated by the Supreme Court on December 26, 1944 (See 327 U.S. 825). Thus it is clear that Rule 54 was intended to encompass old Rule III, which was then in effect, and had been for ten years. And finally, Rule 37 and Rule 54 in virtually their present form were consecutively numbered, indexed, given their title in the same Supreme Court order on February 6, 1946, and published in Volume 327 of the United States Reports, pages 827-876. Our conclusion is that Rule 54, which is the one [fol. 62] Rule spelling out the application of all the Rules to various types of proceedings, without question included Rule 37 as governing procedure in criminal cases removed from State to Federal Courts.

Finally, the Court in its majority opinion pointed out that Rules 32 to 39 were not submitted to Congress pursuant to the "prior to verdict" enabling Act of June 29, 1940, 54 Stat. 688, as amended. This is quite true. However, the majority of the Court overlooked the fact that in the Act of June 25, 1948, c. 645, 62 Stat. 683 entitled "An Act to Revise, Codify, and Enact into Positive Law Title 18 of the United States Code," there appears at page 845 of that statute the following:

"Section 3732. Taking of Appeal—Notice—Time (Rule)

See Fed. Rules of Crim. Procedure, Rule 37 (a)"

Thus it is apparent that Congress *did* consider Rule 37 by embodying it by reference within this enacting, codifying and revising statute, and approved it by passing the statute in that form.

We also feel that the majority of the Court misconstrued and misapplied *Nye* v. *United States,* 1941, 313 U.S. at 43-44. *Nye* was not a criminal case, but an adjudication of criminal contempt arising out of a civil case. The main thrust of the decision in *Nye* was that "the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case." 313 U.S. at page 45. Counsel for Appellee sincerely doubt that the Supreme Court would hold today that Rule 37 is applicable only to "after verdict" cases, in view of all that has happened since the *Nye* decision in 1941. We re-[fol. 63] fer to the enactment of the 1948 Act codifying Title 18, the promulgation of Rule 54 making all the Rules applicable to removed criminal cases, and the amendment to Rule 37 fixing a 30 day time limit for appeal by the government in criminal cases. A distinguished Advisory Committee of outstanding legal scholars worked from February 3, 1941 for nearly three years preparing the "prior to and including verdict" Rules and it is inconceivable that they would have left Rules 32-39 hanging in limbo and applicable only to "after verdict" appeals. It is our belief

that Rule 54 in its entirety does make Rules 32-39 generally applicable to any final order in a criminal case at any stage of the proceedings.

Appellee therefore respectfully insists that District Judge Whitehurst was correct as a matter of law in his partially dissenting opinion, and that the appeal should have been dismissed as being untimely.

Grounds V, VI, VII, VIII and IX

Each of these grounds are essentially similar, in that all deal with the alleged error of this Court on the merits, holding that the Removal Petition filed by Appellants was sufficient as a matter of law to allege a valid claim for removal under Section 1443 (1), Title 28, U.S.C., and that a "bare bones allegation of the existence of a right" requires a hearing before the District Court. Therefore all grounds will be discussed together.

Appellee feels that the Court has overlooked, or has failed to give proper effect to, numerous prior decisions of federal courts which hold that the federal district court must determine its jurisdiction to entertain removed cases, based upon the allegations of the petition for removal. These cases include *Birmingham* v. *Croskey,* D.C., N.D., Ala., 1963, 217 F. Supp. 947; *North Carolina* v. *Jackson,* [fol. 64] D.C., M.D. N.C., 1955, 135 F. Supp. 682; and *Arkansas* v. *Howard,* D.C., E.D. Ark., 1963, 218 F. Supp. 626. In particular, this Court overlooked a controlling opinion of the United States Supreme Court in *Maryland* v. *Soper,* Judge, (No. 1), 1925, 270 U.S. 9, where the Supreme Court granted a writ of mandamus ordering the remand of a removed criminal case to the Courts of Maryland. The Supreme Court considered *nothing but the amended petition for removal,* which is much longer and more factually detailed than the one in the instant case. The Court stated in part in its order granting the writ of mandamus, "Should the District Court deem it proper to allow another amendment to the petition for removal, by

which the averments necessary to bring the case within Sec. 33 are supplied, he will be at liberty to do so. Otherwise the prosecution is to be remanded as upon a peremptory writ." The Court *did not* direct an evidentiary hearing at which essential averments missing from the removal petition could be supplied by testimony. In fact, counsel for Appellee do not know of any case involving the removability of a criminal case from State to Federal Court where it has been held that an evidentiary hearing before the District Court is necessary on "notice type pleadings" such as were filed in the instant case by Appellants.

If District Courts are required to hold detailed and possibly prolonged hearings on totally inadequate petitions for removal which on their face do not clearly show a right of removal (it is impossible to tell from the pleadings in this Petition for Removal just what Appellants do claim—see comment of Circuit Judge Bell on page 19 of the slip opinion), a greatly enlarged burden will be imposed upon such District Courts.

[fol. 65] Appellee respectfully points out that the opinion of this learned Court that a valid claim for removal is stated by the removal petition appears to be based almost entirely upon the use of one word, "statute." The Petition does not even specify by use of *what statute* the State of Georgia allegedly "supports and maintains a policy of racial segregation." This is far too vague to set out a valid cause for removal. Appellee suggests that the Court has overlooked that portion of *Virginia* v. *Rives,* 1879, 100 U.S. 313 which states, at page 320, "By the express requirement of the statute [Section 641, the predecessor of Section 1443(1)] *his petition must set forth the facts* upon which he bases his claim to have his case removed and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings." The Court also overlooked 12 other federal cases to the same effect previously cited in Appellee's brief on the merits, found at Pages 47 and 48, which will not be cited again here, in the interest of space and brevity.

Appellee strongly maintains that no facts sufficient to justify either a removal or a hearing are alleged in this Petition for Removal, and that the District Court did not err in his remand order without a hearing.

Grounds X and XI

Counsel for Appellee strongly urge the majority of this Court that the directive laid down to the District Court as to what should be done upon remand of these cases is erroneous. The majority opinion states that the District Court should give Appellants an opportunity to prove the purpose of their arrests and prosecutions, and if it is established that their removal "from the various places of public accommodation was done for racial reasons, then [fol. 66] under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings."

This virtual mandate to the lower Court goes far beyond any prior ruling by the United States Supreme Court, including the *Hamm* case, supra. It completely ties the hands of the District Court, and strips him of any judicial discretion, regardless of what other evidence may be forthcoming at the hearing. The *Hamm* decision is limited strictly to *peaceful* and *non-forcible* attempts to gain admittance or remain in establishments covered by the Civil Rights Act of 1964. The words "peaceful" and "non-forcible" appear three times in the *Hamm* majority opinion. The Supreme Court has consistently stressed, even in reversing convictions, in cases apparently overlooked by this Court involving racial demonstrations and "sit-ins" prosecuted in State Courts, that the defendant-demonstrators were peaceful, and the demonstrations were non-forcible. Several quotations from recent Supreme Court majority decisions follow:

(1) "There was no testimony that petitioner raised his voice, used offensive language, resisted the officers,

or engaged in any conduct of any kind to adversely affect the good order and tranquility of the City of Louisville." *Thompson* v. *Louisville*, 1962, 362 U.S. 199, 205.

(2) "There was no evidence that any of the demonstrations which resulted from the meeting (to get volunteers for a sit-down demonstration) were disorderly or otherwise in violation of law." (Explanatory words added.) *Shuttlesworth* v. *City of Birmingham, Alabama*, 1963, 83 S. Ct. 1130, 1132.

(3) "The manager and the police conceded that the petitioners were clean, well dressed, inoffensive in con- [fol. 67] duct and that they sat quietly at the counter. . . ." *Peterson* v. *Greenville, South Carolina*, 1963, 83 S. Ct. 1119, 1121.

(4) "There was no evidence that any of the Petitioners were disorderly." *Griffin* v. *Maryland*, 1964, 84 S. Ct. 1770, 1771.

Many other similar statements by the Supreme Court in this type of case could be cited. Their relevance is this: let us suppose, as a hypothetical case, but one which well might be applicable to these Appellants, that upon the hearing the District Court found from the evidence that certain Appellants were in fact removed from the eating establishments because of racial reasons, but found also that the Appellants were disorderly, violent, aggressive, and committed acts of assaults and battery and vandalism, and destruction of property belonging to the eating establishments before Appellants were removed. Clearly *Hamm* would not compel an abatement of the prosecutions here—yet under the majority opinion, the finding of racial causes for the arrests would require the lower Court to dismiss the prosecutions, no matter what the conduct of the Appellants might have been.

Secondly, as Circuit Judge Bell points out so ably in his dissent, the Supreme Court of Georgia has abated a

group of sit-in convictions as a result of the *Hamm* decision. *Bolton et al.* v. *State,* No. 22,810, decided February 8, 1965. Counsel for Appellee insist that Judge Bell's partially dissenting opinion that Appellants should be required to prove in a hearing before the district court that Georgia Courts would not apply the teachings of *Hamm* fairly to them if the cases were remanded to the State Courts, and that the majority opinion involves jeopardy to our dual system of state and federal courts is the cor-
[fol. 68] rect law as to this aspect of the case. Of course, we do not feel that the cases should be remanded to the District Court at all, for the reasons heretofore set forth.

Ground XII

Appellee most respectfully insists that this Court erred in reversing the judgment of the lower Court and remanding the cause with directions, for all the reasons previously outlined in this Petition. The appeal should have been dismissed as untimely, in the first place. If considered on the merits, the remand order of the District Court was correct as a matter of law.

Motion for Rehearing En Banc

Pursuant to Rule 25 a of this Court, the State of Georgia, Appellee, respectfully moves this Court to order a rehearing en banc. This case is most complex, the issues of law are intricate and involved, and the final decision is highly important as legal precedent resolving a jurisdictional question between State and Federal Courts. The history of this case in the Federal Courts clearly reflects the extremely close legal questions involved, because there has been a wide divergence of opinion by the six distinguished and learned Federal Judges who have considered these issues. District Judge Sloan remanded the cases to the State Courts. On a hearing before a panel of the Fifth Circuit Court of Appeals, Chief Judge Tuttle and Circuit Judge Wisdom granted a stay of the remand order, but Dis-

trict Judge Carswell dissented, saying he would grant Appellee's motion to dismiss the appeal. Finally, when the case was decided on its merits on March 7, 1965, Chief Judge [fol. 69] Tuttle wrote the majority opinion, but Circuit Judge Bell and District Judge Whitehurst each dissented in part, with Judge Whitehurst saying he would dismiss the appeal as untimely, and Judge Bell disagreeing with the majority opinion as to the course to be followed by Judge Sloan upon remand of the case to the District Court.

Counsel for Appellee therefore feel justified in asking that all the Honorable Judges of the Fifth Circuit Court of Appeals sit in a rehearing in this case.

Respectfully submitted,

Eugene Cook, Attorney General of the State of Georgia;

Albert Sidney Johnson, Assistant Attorney General of the State of Georgia.

Judicial Building, Atlanta, Georgia 30303.

William T. Boyd, Solicitor General, Atlanta Judicial Circuit;

J. Robert Sparks, Assistant Solicitor General, Atlanta Judicial Circuit.

Fulton County Courthouse, Atlanta, Georgia 30303.
Counsel for Appellee.

[fol. 70]

CERTIFICATE OF SERVICE

Georgia, Fulton County

I, J. Robert Sparks, of counsel for the State of Georgia, Appellee, certify that I have this day served copies of the foregoing Petition for Rehearing En Banc, by depositing in the United States Post Office in Atlanta, Georgia two copies of same in an envelope addressed to Donold L. Hollowell and Howard Moore, Jr., Esquires, Attorneys at Law, 859½ Hunter Street, S.W., Atlanta, Georgia 30314, and two copies of same in an envelope addressed to Jack Greenberg, Esquire, Attorney at Law, 10 Columbus Circle, New York, New York 10019, counsel of record for Appellants, with sufficient first class postage affixed thereto.

I further certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for delay.

This 23rd day of March, 1965.

J. Robert Sparks, Assistant Solicitor General, Atlanta Judicial Circuit.

[fol. 71]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, et al., Appellants,

versus

STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

PER CURIAM ORDER DENYING PETITION FOR REHEARING—April 19, 1965

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

[fol. 72] BELL, Circuit Judge, concurring in part and dissenting in part:

I would grant the petition for rehearing to the extent noted in my dissent to the original opinion and for that purpose I dissent from the denial of the petition for rehearing; otherwise I concur.

WHITEHURST, District Judge, dissenting:

I would grant the petition for rehearing for the reason that the Appellate Court has no jurisdiction by virtue of Rule 37(a)(2) of the F.R.C.P.

Per Curiam: It appearing that each of the members of the Court adheres to his views originally expressed in the several opinions heretofore filed, the petition for rehearing is Denied.

[fol. 73] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 147, October Term, 1965

GEORGIA, Petitioner,

v.

THOMAS RACHEL, et al.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.